

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 PROGRESSIVE INTERNATIONAL
11 CORPORATION,

12 Plaintiff,

13 v.

14 BIG LOTS STORES, INC.,

15 Defendant.
16

CASE NO. 2:17-CV-1046-TSZ

**STIPULATED
PROTECTIVE ORDER**

17 1. PURPOSES AND LIMITATIONS

18 Discovery in this action is likely to involve production of confidential, proprietary, or
19 private information for which special protection may be warranted. Accordingly, the parties
20 hereby stipulate to and petition the court to enter the following Stipulated Protective Order. The
21 parties acknowledge that this agreement is consistent with LCR 26(c). It does not confer blanket
22 protection on all disclosures or responses to discovery, the protection it affords from public
23 disclosure and use extends only to the limited information or items that are entitled to
24 confidential treatment under the applicable legal principles, and it does not presumptively entitle
25 parties to file confidential information under seal.
26

1 2. “CONFIDENTIAL” MATERIAL

2 “Confidential” material shall include the following documents and tangible things
3 produced or otherwise exchanged: financial documents (including sales, shipping, profits,
4 inventories, costs, taxes, and similar documents), product development, technical schematics,
5 customers and customer lists, vendors, suppliers, pricing, and marketing plans and techniques.

6 3. SCOPE

7 The protections conferred by this agreement cover not only confidential material (as
8 defined above), but also (1) any information copied or extracted from confidential material; (2)
9 all copies, excerpts, summaries, or compilations of confidential material; and (3) any testimony,
10 conversations, or presentations by parties or their counsel that might reveal confidential material.

11 However, the protections conferred by this agreement do not cover information that is in
12 the public domain or becomes part of the public domain through trial or otherwise.

13 4. ACCESS TO AND USE OF CONFIDENTIAL MATERIAL

14 4.1 Basic Principles. A receiving party may use confidential material that is disclosed
15 or produced by another party or by a non-party in connection with this case only for prosecuting,
16 defending, or attempting to settle this litigation. Confidential material may be disclosed only to
17 the categories of persons and under the conditions described in this agreement. Confidential
18 material must be stored and maintained by a receiving party at a location and in a secure manner
19 that ensures that access is limited to the persons authorized under this agreement.

20 4.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise
21 ordered by the court or permitted in writing by the designating party, a receiving party may
22 disclose any confidential material only to:

23 (a) the receiving party’s counsel of record in this action, as well as employees
24 of counsel to whom it is reasonably necessary to disclose the information for this litigation;

25 (b) the officers, directors, and employees (including in house counsel) of the
26 receiving party to whom disclosure is reasonably necessary for this litigation, unless the

1 designating party designates that a particular document or material produced is for Attorney's
2 Eyes Only (meaning that it contains confidential information that the designating party believes
3 in good faith cannot be disclosed without threat of competitive injury) and is so designated under
4 the label "CONFIDENTIAL—ATTORNEYS' EYES ONLY" or "ATTORNEYS EYES
5 ONLY," in which case the designated material may not be disclosed to such persons in this
6 paragraph;

7 (c) experts and consultants to whom disclosure is reasonably necessary for
8 this litigation and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit
9 A), provided that at least ten days before access is given, the consultant or expert is disclosed to
10 the designating party by serving a curriculum vitae of the consultant or expert upon counsel for
11 the designating party to allow the designating party the opportunity to object in writing to the
12 proposed access. The parties agree to promptly confer in good faith to resolve any such
13 objection. If the parties are unable to resolve any objection, the objecting party may file a motion
14 with the court within fifteen days of the objection, or within such other time as the parties may
15 agree, seeking a protective order against disclosure. No disclosure shall be provided to the
16 proposed expert or consultant until all such objections are resolved by agreement or court order;

17 (d) the court, court personnel, and court reporters and their staff;

18 (e) independent litigation support services including court reporters, jury or
19 trial consultants, document database services, and copy or imaging services retained by counsel
20 to assist in the duplication of confidential material, provided that counsel for the party retaining
21 the support service instructs the service not to disclose any confidential material to third parties
22 and to immediately return all originals and copies of any confidential material;

23 (f) during their depositions, witnesses in the action to whom disclosure is
24 reasonably necessary and who have signed the "Acknowledgment and Agreement to Be Bound"
25 (Exhibit A), unless otherwise agreed by the designating party or ordered by the court. Pages of
26 transcribed deposition testimony or exhibits to depositions that reveal confidential material must

1 be separately bound by the court reporter and may not be disclosed to anyone except as permitted
2 under this agreement;

3 (g) the author or recipient of a document containing the information or a
4 custodian or other person who otherwise possessed or knew the information.

5 4.3 Filing Confidential Material. Before filing confidential material or discussing or
6 referencing such material in court filings, the filing party shall confer with the designating party
7 to determine whether the designating party will remove the confidential designation, whether the
8 document can be redacted, or whether a motion to seal or stipulation and proposed order is
9 warranted. Local Civil Rule 5(g) sets forth the procedures that must be followed and the
10 standards that will be applied when a party seeks permission from the court to file material under
11 seal.

12 5. DESIGNATING PROTECTED MATERIAL

13 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each party
14 or non-party that designates information or items for protection under this agreement must take
15 care to limit any such designation to specific material that qualifies under the appropriate
16 standards. The designating party must designate for protection only those parts of material,
17 documents, items, or oral or written communications that qualify, so that other portions of the
18 material, documents, items, or communications for which protection is not warranted are not
19 swept unjustifiably within the ambit of this agreement.

20 Mass, indiscriminate, or routinized designations are prohibited. Designations that are
21 shown to be clearly unjustified or that have been made for an improper purpose (*e.g.*, to
22 unnecessarily encumber or delay the case development process or to impose unnecessary
23 expenses and burdens on other parties) expose the designating party to sanctions.

24 If it comes to a designating party's attention that information or items that it designated
25 for protection do not qualify for protection, the designating party must promptly notify all other
26 parties that it is withdrawing the mistaken designation.

1 5.2 Manner and Timing of Designations. Except as otherwise provided in this
2 agreement (see, *e.g.*, second paragraph of section 5.2(a) below), or as otherwise stipulated or
3 ordered, disclosure or discovery material that qualifies for protection under this agreement must
4 be clearly so designated before or when the material is disclosed or produced.

5 (a) Information in documentary form: (*e.g.*, paper or electronic documents
6 and deposition exhibits, but excluding transcripts of depositions or other pretrial or trial
7 proceedings), the designating party must affix the word “CONFIDENTIAL” or
8 “CONFIDENTIAL—ATTORNEYS’ EYES ONLY” or “ATTORNEYS EYES ONLY” to each
9 page that contains confidential material. If only a portion or portions of the material on a page
10 qualifies for protection, the producing party also must clearly identify the protected portion(s)
11 (*e.g.*, by making appropriate markings in the margins).

12 (b) Testimony given in deposition or in other pretrial proceedings: the parties
13 and any participating non-parties must identify on the record, during the deposition or other
14 pretrial proceeding, all protected testimony, without prejudice to their right to so designate other
15 testimony after reviewing the transcript. Any party or non-party may, within fifteen days after
16 receiving the transcript of the deposition or other pretrial proceeding, designate portions of the
17 transcript, or exhibits thereto, as confidential or for attorneys eyes only. If a party or non-party
18 desires to protect confidential information at trial, the issue should be addressed during the pre-
19 trial conference.

20 (c) Other tangible items: the producing party must affix in a prominent place
21 on the exterior of the container or containers in which the information or item is stored the word
22 “CONFIDENTIAL” or “CONFIDENTIAL—ATTORNEYS’ EYES ONLY” or “ATTORNEYS
23 EYES ONLY.” If only a portion or portions of the information or item warrant protection, the
24 producing party, to the extent practicable, shall identify the protected portion(s).

25 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to
26 designate qualified information or items does not, standing alone, waive the designating party’s

1 right to secure protection under this agreement for such material. Upon timely correction of a
2 designation, the receiving party must make reasonable efforts to ensure that the material is
3 treated in accordance with the provisions of this agreement.

4 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

5 6.1 Timing of Challenges. Any party or non-party may challenge a designation of
6 confidentiality at any time. Unless a prompt challenge to a designating party's confidentiality
7 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic
8 burdens, or a significant disruption or delay of the litigation, a party does not waive its right to
9 challenge a confidentiality designation by electing not to mount a challenge promptly after the
10 original designation is disclosed.

11 6.2 Meet and Confer. The parties must make every attempt to resolve any dispute
12 regarding confidential designations without court involvement. Any motion regarding
13 confidential designations or for a protective order must include a certification, in the motion or in
14 a declaration or affidavit, that the movant has engaged in a good faith meet and confer
15 conference with other affected parties in an effort to resolve the dispute without court action. The
16 certification must list the date, manner, and participants to the conference. A good faith effort to
17 confer requires a face-to-face meeting or a telephone conference.

18 6.3 Judicial Intervention. If the parties cannot resolve a challenge without court
19 intervention, the designating party may file and serve a motion to retain confidentiality under
20 Local Civil Rule 7 (and in compliance with Local Civil Rule 5(g), if applicable). The burden of
21 persuasion in any such motion shall be on the designating party. Frivolous challenges, and those
22 made for an improper purpose (*e.g.*, to harass or impose unnecessary expenses and burdens on
23 other parties) may expose the challenging party to sanctions. All parties shall continue to
24 maintain the material in question as confidential until the court rules on the challenge.

1 7. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER
2 LITIGATION

3 If a party is served with a subpoena or a court order issued in other litigation that compels
4 disclosure of any information or items designated in this action as “CONFIDENTIAL,” or
5 “CONFIDENTIAL—ATTORNEYS’ EYES ONLY” or “ATTORNEYS EYES ONLY,” that
6 party must:

7 (a) promptly notify the designating party in writing and include a copy of the
8 subpoena or court order;

9 (b) promptly notify in writing the party who caused the subpoena or order to
10 issue in the other litigation that some or all of the material covered by the subpoena or order is
11 subject to this agreement. Such notification shall include a copy of this agreement; and

12 (c) cooperate with respect to all reasonable procedures sought to be pursued
13 by the designating party whose confidential material may be affected.

14 8. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

15 If a receiving party learns that, by inadvertence or otherwise, it has disclosed confidential
16 material to any person or in any circumstance not authorized under this agreement, the receiving
17 party must immediately (a) notify in writing the designating party of the unauthorized
18 disclosures, (b) use its best efforts to retrieve all unauthorized copies of the protected material,
19 (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of
20 this agreement, and (d) request that such person or persons execute the “Acknowledgment and
21 Agreement to Be Bound” that is attached hereto as Exhibit A.

22 9. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED
23 MATERIAL

24 When a producing party gives notice to receiving parties that certain inadvertently
25 produced material is subject to a claim of privilege or other protection, the obligations of the
26 receiving parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This

1 provision is not intended to modify whatever procedure may be established in an e-discovery
2 order or agreement that provides for production without prior privilege review. The parties
3 agree to the entry of a non-waiver order under Fed. R. Evid. 502(d) as set forth herein.

4 10. NON TERMINATION AND RETURN OF DOCUMENTS

5 Within 60 days after the termination of this action, including all appeals, each receiving
6 party must return all confidential material to the producing party, including all copies, extracts
7 and summaries thereof. Alternatively, the parties may agree upon appropriate methods of
8 destruction.

9 Notwithstanding this provision, counsel are entitled to retain one archival copy of all
10 documents filed with the court, trial, deposition, and hearing transcripts, correspondence,
11 deposition and trial exhibits, expert reports, attorney work product, and consultant and expert
12 work product, even if such materials contain confidential material.

13 The confidentiality obligations imposed by this agreement shall remain in effect until a
14 designating party agrees otherwise in writing or a court orders otherwise.

15 11. THIRD PARTIES

16 To the extent any discovery is taken of persons who are not parties to this action (“Third
17 Parties”), and in the event that such Third Parties reasonably believe that the discovery sought
18 involves Confidential material, the Third Parties may produce and designate the Confidential
19 material in accordance with this order, and in such case all applicable provisions of this order
20 shall apply to the Third Party designated material to the same extent as if it had been designated
21 and produced by a party.

1 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

2 **LOWE GRAHAM JONES^{PLLC}**

3 By: /s/ Lawrence D. Graham

4 Lawrence D. Graham, WSBA No. 25402

701 Fifth Avenue, Suite 4800

5 Seattle, Washington 98104

T: 206.381.3300

6 F: 206.381.3301

7 Graham@LoweGrahamJones.com

8 *Attorneys for Plaintiff Progressive International Corp.*

9 **SAVITT BRUCE & WILLEY LLP**

10 By: /s/ Duncan E. Manville

Duncan E. Manville, WSBA #30304

11 1425 Fourth Avenue, Suite 800

12 Seattle, Washington 98101-2272

Tel.: (206) 749-0500

13 Fax: (206) 749-0600

14 Email: dmanville@sbwllp.com

15 **WOOD, HERRON & EVANS LLP**

16 By: /s/ Paul J. Linden

Paul J. Linden (*pro hac vice*)

2700 Carew Tower

17 441 Vine Street

Cincinnati, Ohio 45202-2917

18 Tel.: (513) 241-2324

Fax: (513) 241-6234

19 Email: plinden@whe-law.com

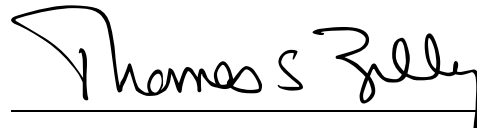
20 jsiderits@whe-law.com

21 *Attorneys for Defendant Big Lots Stores, Inc.*

1 PURSUANT TO STIPULATION, IT IS SO ORDERED

2
3 IT IS FURTHER ORDERED that pursuant to Fed. R. Evid. 502(d), the production of any
4 documents in this proceeding shall not, for the purposes of this proceeding or any other
5 proceeding in any other court, constitute a waiver by the producing party of any privilege
6 applicable to those documents, including the attorney-client privilege, attorney work-product
7 protection, or any other privilege or protection recognized by law.

8
9 DATED: February 8, 2018.

10
11 

12 Thomas S. Zilly
13 United States District Judge
14
15
16
17
18
19
20
21
22
23
24
25
26

1 EXHIBIT A

2 ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

3 I, _____ [print or type full name], of
4 _____ [print or type full address], declare under penalty of
5 perjury that I have read in its entirety and understand the Stipulated Protective Order that was
6 issued by the United States District Court for the Western District of Washington on [date] in the
7 case of Progressive International Corporation v. Big Lots Stores, Inc., Case No. 2:17-cv-
8 1046TSZ. I agree to comply with and to be bound by all the terms of this Stipulated Protective
9 Order and I understand and acknowledge that failure to so comply could expose me to sanctions
10 and punishment in the nature of contempt. I solemnly promise that I will not disclose in any
11 manner any information or item that is subject to this Stipulated Protective Order to any person
12 or entity except in strict compliance with the provisions of this Order.

13 I further agree to submit to the jurisdiction of the United States District Court for the
14 Western District of Washington for the purpose of enforcing the terms of this Stipulated
15 Protective Order, even if such enforcement proceedings occur after termination of this action.

16 Date: _____

17 City and State where sworn and signed: _____

18 Printed name: _____

19 Signature: _____
20
21
22
23
24
25
26